

MAY 14 2001

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20054

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

|   |   |                      |
|---|---|----------------------|
| In re Applications of                             | ) |                      |
|   | ) |                      |
| Ameritech Corp.,                                  | ) |                      |
| Transferor,                                       | ) |                      |
|   | ) |                      |
| AND   | ) |                      |
|   | ) |                      |
| SBC Communications Inc.,                          | ) | CC Docket No. 98-141 |
| Transferee,                                       | ) |                      |
|   | ) |                      |
| For Consent to Transfer Control of                | ) |                      |
| Corporations Holding Commission Licenses and      | ) |                      |
| Lines Pursuant to Sections 214 and                | ) |                      |
| 310(d) of the Communications Act and              | ) |                      |
| Parts 5, 22, 24, 25, 63, 90, 95, and 101 of the   | ) |                      |
| Commission's Rules                                | ) |                      |
|   | ) |                      |
| Birch Telecom, Inc. Request for Interpretation of | ) |                      |
| Most-Favored Nation Condition                     | ) |                      |

**REPLY COMMENTS OF SBC COMMUNICATIONS INC.**

SBC Communications Inc. (SBC) submits the following Reply Comments in the above-captioned proceeding. In their comments, several CLECs seek to rewrite paragraph 43 of the SBC/Ameritech Merger Conditions<sup>1</sup> to require SBC's operating companies (hereinafter referred to as "SBC") to permit requesting carriers to incorporate a reciprocal compensation arrangement from an existing agreement into current or future contracts in other states; to require SBC to permit requesting carriers to opt in to entire agreements across state-lines; or to permit CLECs to

<sup>1</sup> *Applications of Ameritech Corp., Transferor, and SBC Communications Inc., Transferee, for Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95, and 101 of the Commission's Rules, CC Docket No. 98-141, Memorandum Opinion and Order, 14 FCC Rcd 14712, Appendix C at para. 43 (1999) (SBC/Ameritech Merger Order).*

opt-in to arbitrated agreements. In support of these requests, the CLECs offer little more than invective and grandiloquent appeals for the Commission to look to the purpose, rather than the plain language, of paragraph 43. However, the CLECs' screed is no substitute for reasoned analysis, nor does it provide any basis for disregarding the plain language of the Merger Conditions, the Commission's prior findings concerning SBC's voluntary MFN commitment, or its findings regarding the MFN provision in section 252(i) of the Act. As discussed below, each of the CLECs' requests should be denied.

A number of CLECs, without any independent analysis, simply parrot Birch's claim that SBC's MFN commitment in paragraph 43 can, and should, be interpreted to encompass reciprocal compensation arrangements.<sup>2</sup> In its initial comments, SBC thoroughly refuted Birch's claim, and will not repeat those comments here. However, it observes that, like the Bureau itself (by asking whether there are grounds to modify SBC's MFN commitment),<sup>3</sup> several CLECs

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<sup>2</sup> Comments of the Association of Communications Enterprises (ASCENT) at 12 (stating simply that, "ASCENT agrees with Birch's interpretation and sees nothing in the Intercarrier Compensation Order on Remand which would alter this conclusion."); Comments of McLeod USA Telecommunications Services, Inc. (McLeod) at 1 (stating that McLeod "concur[s] in the position of Birch," and arguing without analysis that SBC's commitment is intended to "encompass all matters which are the subject of negotiations between parties to the interconnection agreement in question"); Comments of WorldCom, Inc. at 4-5 (arguing that paragraph 43 "requires SBC to make interconnection arrangements available 'to the same extent and under the same rules that would apply to a request under 47 U.S.C. § 252(i),' " but ignoring the qualifying phrase immediately preceding the quoted language, which makes clear that SBC's commitment is limited, among other things, only to "interconnection arrangements" and "UNEs," and does not include price); and Comments of Birch Telecom, Inc. at 3-4. Oddly, Birch asserts, "[i]t seems that SBC/Ameritech would rather seek waivers or modifications of Merger Conditions than to implement the commitments it has previously made to this Commission and to consumers." Birch at 3-4 (further stating that "Birch emphatically opposes waiver or modification by SBC/Ameritech of its MFN obligations under the Merger Conditions"). However, as Birch well knows, it was Birch itself that initiated this matter, and which now seeks to modify, through so-called "interpretation," SBC's voluntary MFN commitment in paragraph 43.

<sup>3</sup> Common Carrier Bureau Seeks Comment on Letters Filed by Verizon and Birch Regarding Most-Favored Nation Condition of SBC/Ameritech and Bell Atlantic/GTE Orders, DA 01-722 at 2., rel. March 30, 2001 (*Public Notice*).

themselves acknowledge that SBC's commitment does not extend to reciprocal compensation arrangements by urging the Commission to modify paragraph 43 to include such arrangements.<sup>4</sup> Of course, if SBC's MFN commitment in paragraph 43 already required SBC to permit CLECs in one state to opt into reciprocal compensation arrangements in other states, as some of the CLECs suggest, there would be no need to modify that commitment. The Commission (or Bureau, as the case may be) therefore should reject the claim by Birch and others that paragraph 43 of the Merger Conditions can, and should, be interpreted to encompass reciprocal compensation arrangements.

Several other CLECs, in joint comments, do not dispute that paragraph 43 does not extend to reciprocal compensation.<sup>5</sup> Rather, they unabashedly assert that SBC's MFN commitment in paragraph 43 must be rewritten to prevent SBC's so-called "abuse of the interconnection process."<sup>6</sup> Specifically, the Joint Commenters allege that, because SBC's MFN commitment is limited (among other things) to negotiated agreements, SBC has been able to engage in a so-called "ploy" to subvert its MFN obligations under paragraph 43 by "engag[ing]

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<sup>4</sup> Comments of Adelphia Business Solutions, Inc. at 6 ("the FCC should modify the SBC Merger Conditions so that it tracks the obligations of the Verizon Merger Conditions"); Comments of Allegiance Telecom, Inc. and RCN Telecom Services, Inc. at 18 ("Consistent with [the] interpretation of the BA/GTE Merger Condition requested here, the FCC should also modify the SBC Merger Condition so that it tracks the obligations of the BA/GTE Merger Condition."). In its comments, SBC also demonstrated that there are no grounds for the Commission to modify SBC's MFN commitment, and will not repeat those comments here.

<sup>5</sup> Joint Comments of the Competitive Telecommunications Association, Advanced Telecom Group, Inc., and KMC Telecom, Inc. (Joint Commenters).

<sup>6</sup> *Id.* at iii. Without recognizing the inconsistency of their argument, the Joint Commenters, in three successive sentences, assert: (1) in its order approving the SBC/Ameritech merger, the Commission "assumed that SBC . . . would comply with the merger conditions; (2) "[t]his assumption has now been proven false;" and (3) "[t]he Joint Commenters therefore urge modification and enforcement of the conditions." *Id.* at ii. The Joint Commenters' position makes no sense. Plainly, if SBC's conduct has violated the merger conditions as the Joint Commenters suggest, there would be no need to modify them, the Commission need only enforce them. Although they obviously are loathe to admit it, the Joint Commenters seem to recognize that SBC's MFN obligation is not so broad as they suggest.

in unnecessary arbitration.”<sup>7</sup> The Joint Commenters urge the Commission to modify SBC’s MFN commitment by extending it to arbitrated agreements, and thus close this purported “loophole” in paragraph 43.<sup>8</sup>

The Joint Commenters’ request should be rejected. In the first place, the premise underlying its request (that SBC has “engaged in unnecessary arbitration”) is false. Since the merger, SBC has engaged in negotiations with a multitude of CLECs across its 13-state region, reaching agreement on a myriad of issues. To give but one example, on November 7, 2000, TDS Metrocom, Inc. (TDS Metrocom), filed with the Public Service Commission of Wisconsin (Wisconsin PSC) a petition for arbitration of an interconnection agreement with Wisconsin Bell, Inc. d/b/a Ameritech Wisconsin (a wholly-owned subsidiary of SBC), which sought arbitration of 220 issues, to which Ameritech added four issues. Of those 224 issues, the parties resolved more than 100 through negotiation before the Wisconsin PSC issued a decision.<sup>9</sup> Subsequently, on April 20, 2001, TDS Metrocom filed with the Illinois Commerce Commission a request for arbitration of unresolved issues resulting from negotiations between TDS Metrocom and Illinois Bell Telephone Company d/b/a Ameritech Illinois (another wholly-owned subsidiary of SBC).<sup>10</sup> In its request, TDS Metrocom acknowledged that it had engaged in negotiations with all five

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<sup>7</sup> *Id.* at 8.

<sup>8</sup> *Id.* at 9-10.

<sup>9</sup> TDS Metrocom, Inc., Petition for Arbitration of Interconnection Terms, Conditions, and Prices from Wisconsin Bell, Inc. d/b/a Ameritech Wisconsin, Docket Number 05-MA-123, Arbitration Award at 3 (rel. March 12, 2001) (citing joint statement of unresolved issues for arbitration, reporting that the parties had resolved issues: TDS 2, 5-7, 9-10, 12-14, 16, 18, 21-24, 26, 29, 42-47, 60-61, 63, 67, 82-83, 87, 97, 99, 104-06, 108, 110, 113-18, 120-22, 128, 131-39, 141-43, 145-48, 150-52, 154, 161-62, 164-66, 169-75, 178, 181-82, 184-89, 191-95, 198-200, 202-205, 207-211, 213-14, 216, and AIT 1-3).

<sup>10</sup> TDS Metrocom, Inc. Petition for Arbitration of Interconnection Rates, Terms and Conditions and Related Arrangements with Illinois Bell Telephone Company d/b/a Ameritech Illinois Pursuant to Section 252(b) of the Telecommunications Act of 1996, Docket 01-\_\_\_\_\_ (filed April 20, 2001).

operating company subsidiaries of Ameritech Corporation (Ameritech) (a holding company subsidiary of SBC) in the Ameritech states (Wisconsin, Illinois, Indiana, Ohio and Michigan), as well as an arbitration in Wisconsin, and reached agreement on “a substantial number of issues.”<sup>11</sup> Of the original 224 issues between TDS Metrocom and the operating company subsidiaries of Ameritech, only 70 remained unresolved as of April 20, 2001,<sup>12</sup> and that number now is down to approximately 60 issues. Consequently, SBC’s operating company subsidiaries not only are continuing actively to negotiate with CLECs, they are permitting them to incorporate contract provisions relating to interconnection arrangements and UNEs negotiated in one state into agreements in other states consistent with SBC’s MFN commitment in paragraph 43.

More importantly, the Commission has already considered and rejected CLEC arguments that SBC’s MFN commitment in paragraph 43 should extend to arbitrated agreements. In the *SBC/Ameritech Merger Order*, the Commission noted that “[s]everal competitive LECs [had] urge[d] us to make available in all 13 SBC/Ameritech states any interconnection arrangement or network element that is available in any SBC or Ameritech state, whether voluntarily negotiated or arbitrated,”<sup>13</sup> which is precisely what the Joint Commenters seek here. The Commission rejected these proposals. Specifically, it “decline[d] to expand the condition to arbitrated arrangements” because it found that “doing so might interfere with the state arbitration process under sections 251 and 252” by permitting one state “effectively [to] interpret the merged firm’s obligations under sections 251 and 252 for all other states.”<sup>14</sup> The Commission further found

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<sup>11</sup> *Id.* at 9.

<sup>12</sup> *Id.* at 10.

<sup>13</sup> *SBC/Ameritech Merger Order*, 14 FCC Rcd 14712 at para. 491 (citations omitted).

<sup>14</sup> *Id.*

that applying the condition “only to arrangements negotiated by an affiliate of SBC” was reasonable because SBC, “bearing in mind its commitment to implement best practices, will be on notice as to which systems and procedures could become uniform across its regions.”<sup>15</sup> The Joint Commenters’ have offered the Commission no justification for revisiting those findings here.

The Joint Commenters go so far as to assert that their proposal is a “reasonable and legally supported construction of section 252(i) that the Commission can and should adopt today.”<sup>16</sup> In particular, they claim that, “construed according to its plain language, section 252(i) is consistent with an MFN condition that requires agreements arbitrated in one state to be made available for use in other states in same [sic] ILEC region.”<sup>17</sup>

Apart from the obvious notice problems that would attend immediate Commission adoption of the Joint Commenters’ proposed construction of section 252(i), their construction is patently inconsistent with the language and structure of section 252, which establishes the procedures for negotiation, arbitration and approval of interconnection agreements. Those procedures fundamentally are state-based. In particular, they provide that interconnection agreements are to be negotiated and approved on a state-by-state basis by the relevant state commission.<sup>18</sup> The procedures further provide for arbitration by the relevant state commission of

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<sup>15</sup> *Id.* at para. 492. In paragraph 492, the Commission specifically declined a request by some commenters to apply SBC’s MFN commitment to agreements negotiated by Ameritech, Pacific Bell or SNET prior to their acquisition by SBC. Its rationale for refusing that request applies here.

<sup>16</sup> Joint Commenters’ Comments at 11.

<sup>17</sup> *Id.*

<sup>18</sup> See 47 U.S.C. § 252(a)(1) & (2) (providing for the submission of interconnection agreements to the relevant state commission for approval, and for mediation by the relevant state commission of any difference arising through the negotiation).

any issues not resolved through negotiation.<sup>19</sup> Indeed, the statute specifically provides for each state commission independently to assess the reasonableness of rates for interconnection arrangements and UNEs, as well as the reasonableness of the terms and conditions for transport and termination (*i.e.*, reciprocal compensation).<sup>20</sup> Moreover, section 252(i) requires a local exchange carrier to make available interconnection, services or UNEs provided under an agreement approved under section 252 to which it is a party to any other carrier “upon the same terms and conditions as those provided in the agreement.”<sup>21</sup> Because carriers’ network architectures, systems, and cost structures vary state-to-state, the rates and terms under which interconnection arrangements and UNEs (not to mention reciprocal compensation) are provided also vary state-to-state. Indeed, it was precisely because the process for negotiation, arbitration and approval of interconnection agreements is state-based that the Commission left implementation of section 252(i) to the states.<sup>22</sup> And it was for the very same reason that the Commission declined to expand SBC’s MFN commitment in paragraph 43 to arbitrated agreements.<sup>23</sup> The Joint Commenters’ superficial analysis fails utterly to come to grips with the language and structure of section 252; nor is it consistent with the Commission’s prior findings

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<sup>19</sup> 47 U.S.C. § 252(b) (establishing procedures for state commission arbitration of disputed issues).

<sup>20</sup> 47 U.S.C. §§ 252(d)(1) (establishing pricing standards for state determinations regarding interconnection arrangements and UNEs) and 252(d)(2) (establishing separate standards for state determinations regarding reciprocal compensation).

<sup>21</sup> 47 U.S.C. § 252(i).

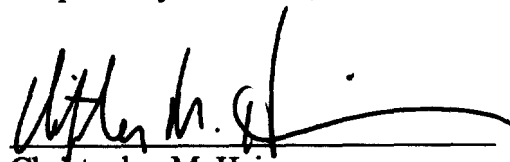
<sup>22</sup> *Local Competition Order*, 11 FCC Rcd at 16141 (“Since agreements shall necessarily be filed with the states pursuant to section 252(h), we leave to state commissions in the first instance the details of the procedures for making agreements available to requesting carriers on an expedited basis.”).

<sup>23</sup> *SBC/Ameritech Merger Order*, 14 FCC Rcd 14712 at para. 491 (“We decline to expand the condition to arbitrated arrangements because doing so might interfere with the state arbitration process under sections 251 and 252 of the Communications Act. . . . If we required SBC/Ameritech to import arbitrated terms and conditions from one state into all others, then one state could effectively interpret the merged firm’s obligations under sections 251 and 252 for all other states.”).

regarding section 252(i) and the SBC/Ameritech merger conditions.<sup>24</sup> Accordingly, the Joint Commenters' proposed construction of section 252(i) and SBC's MFN commitment in paragraph 43 should be rejected.

For the foregoing reasons, the Commission should reject the CLEC's attempt to rewrite SBC's MFN obligation in paragraph 43 of the SBC/Ameritech Merger Conditions.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Christopher M. Heimann", written over a horizontal line.

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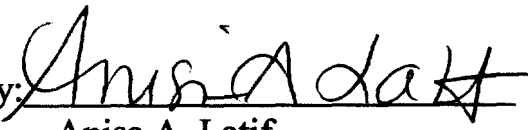
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<sup>24</sup> SBC further notes that the Joint Commenters' proposed construction of section 252(i) and SBC's MFN commitment presupposes that SBC and other regional holding companies have only one operating company subsidiary. Section 252(i) only requires a local exchange carrier to make available interconnection arrangements, services or UNEs that it provides under an approved agreement to which it itself is a party. 47 U.S.C. § 252(i). By suggesting that section 252(i) can be interpreted to permit a requesting carrier to import an arbitrated agreement from one state to another in a given region, the Joint Commenters evidently believe that regional holding companies like SBC have only one ILEC operating company. In fact, SBC and other regional holding companies operate multiple, separate ILECs throughout their regions.



CERTIFICATE OF SERVICE

I, Anisa A. Latif, do hereby certify that a copy of the **Reply Comments of SBC Communications Inc.** has been served on the parties attached via first class mail – postage prepaid on this 14<sup>th</sup> day of May 2001.

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